No. 86-1402

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KENNETH S. CAMERON,

Petitioner,

—v.—

MATTHEW FOGARTY and JOHN HALBIG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the common law principle in some states barring a tort action for false arrest by a person subsequently convicted should be incorporated into 42 U.S.C. § 1983, thereby denying a remedy for an egregious violation of a fundamental constitutional right?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Kenneth S. Cameron asks that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, entered on December 1, 1986.

Opinions Below

The opinion of the Court of Appeals is reported at 806 F.2d 380 and is annexed to this petition as Appendix A. The unreported opinion of the United States District Court for the Southern District of New York is annexed as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on December 1, 1986. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Statutory and Constitutional Provisions Involved

The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides:

> Every person who, under order of any statute, ordinance, regulation, custom, or usage, of any state or territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case

On February 13, 1980, respondents Fogarty and Halbig, two New York City police officers, observed petitioner Cameron, a black man, make an illegal turn in a car with a broken vent window. The officers stopped Cameron for questioning. After he exited from the car, Cameron produced a facially valid driver's license and Hertz rental agreement. The officers sought information over the radio as to whether the car had been reported stolen, but received no such information. Nonetheless, the officers arrested Cameron and brought him to the station house for further investigation.

Based on evidence gathered after he was brought to the station house, Cameron was convicted of possession of stolen property, namely the Hertz rental car.

Cameron filed a civil rights complaint for damages under 42 U.S.C. § 1983 alleging that he was arrested without probable cause. The court below, affirming the district court, ruled that because Cameron had been convicted, he could not bring a § 1983 suit alleging unconstitutional arrest. The Second Circuit denied Cameron his federal remedy by incorporating into § 1983 a common law rule that those convicted are precluded from bringing tort actions for false arrest.

Despite § 1983's salutary goals of protecting civil rights and preventing misuse of police power, the court below applied a narrow common law rule embodying notions such as: an arrested person deserves no redress because "he got exactly what was coming to him," and the "success" of the officer's conduct "justifies the law in ignoring the means of its accomplishment." 1 Harper & James, *The Law of Torts*, 281, 346-47 (1956). Those tort notions flatly contradict § 1983's objectives of protecting our citizens and curbing misuse of state power, and, accordingly, should not be incorporated into our nation's fundamental civil rights law.

In addition, the decision below is inconsistent with an opinion of this Court and also conflicts with the rulings of several other circuits.

Reasons for Granting the Writ

I.

The Decision Below Thwarts the Objectives of § 1983

Under the decision below, an individual who is unlawfully swept off the street into custody because of a police officer's unfounded hunch, but who is eventually convicted on evidence developed days or weeks after the arrest, is left without any remedy for the unconstitutional arrest. Sanctioning this "end justifies the means" police method encourages the police to arrest anyone who looks suspicious—because he or she is black, or young, or simply different. The Court should grant the writ to consider this serious erosion of protection under § 1983.

The principal purposes of § 1983 are twofold: to prevent abuse of state power, and to compensate persons whose civil rights have been violated. *Burnett* v. *Grattan*, 468 U.S. 42, 53 (1984); *Board of Regents* v. *Tomanio*, 446 U.S. 478, 488 (1980). The decision below thwarts both statutory goals.

The court below incorporated into § 1983 the so-called "common law bar" to tort claims for false arrest by a plaintiff previously convicted. But state tort law should only be incorporated into § 1983 when it harmonizes with the overriding purposes of § 1983. As this Court recognized:

> The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.

Carey v. *Piphus*, 435 U.S. 247, 258 (1978).

This Court has also determined that "it would defeat the promise of [§ 1983] to recognize any pre-existing immunity [or defense] without determining both the policies that it serves and its compatibility with the purposes of § 1983." *City of Newport* v. *Fact Concerns, Inc.*, 453 U.S. 247, 259 (1981).

By incorporating the "common law bar" to false arrest claims into § 1983 actions, the court below failed to recognize the clear conflict between state tort law and a federal statute designed to protect constitutional rights.

The common law bar to a tort action for false arrest is not concerned with the constitutional policies underlying § 1983. Nor is the state tort law based on the theory that probable cause for the arrest was actually or implicitly determined by the criminal conviction. Rather, the state tort principle embodies the policy that a damage award is not justified from the standpoint of either actor: plaintiff, being a guilty person, is morally undeserving of a recovery, while the arresting officer, having done his job of catching a criminal, should not be punished for his success. As a leading treatise explains, "the plaintiff got exactly what was coming to him," and "[r]egardless of the general questionable or even unjustifiable nature of his conduct, the defendant has done a good turn in the particular case." 1 Harper & James, *The Law of Torts* 281, 347 (1956). The treatise concludes: "The law is practical business. No need for going into such questions as reasonableness or

probable cause." *Id.* at 347. This may have been valid state tort law in the nineteenth century. But it surely is not a principled statement of federal constitutional law today.

The decision below incorporated the common law bar, as adhered to by New York courts, by wrongly assuming that the common law bar is uniformly followed. But adherence to the common law bar is not universal, as pointed out by the Harper & James treatise cited above. *Supra*, at 280. California tort law, for example, does not foreclose a false arrest claim after conviction. The Supreme Court of that state explained:

> No one can recover damages for a legal arrest and conviction; therefore, in cases of malicious prosecution it becomes necessary to await the final determination of the action. *But the same principle does not apply to an action for false imprisonment, as the form of action is based on an illegal arrest and no matter ex post facto can legalize an act which was illegal at the time it was done.*

Singleton v. *Perry*, 45 Cal. 2d 489, 495, 289 P.2d 794, 798 (Cal. 1955) (emphasis added).

The decision below, by immunizing police officers whose "gut" feelings turn out to be correct, represents approval of police activity predicated upon hunches rather than upon probable cause. As discussed below, such approval is anathema to the two purposes of the federal civil rights laws: to prevent abuse of state power, and to compensate those injured by violations of their civil rights.

Deterrence of Police Abuse

The state tort rule allows police officers who arrest without probable cause to escape liability if their guesses turn out to be correct. In contrast, § 1983 was enacted to discourage police from overstepping the boundaries of lawful power. *Scheuer* v. *Rhodes*, 416 U.S. 232, 243 (1974). Such boundaries prohibit making warrantless arrests unless there is probable cause—

unless there are "facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' " *Gerstein* v. *Pugh*, 420 U.S. 103, 111-12 (1975) (quoting *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964)).

Deterrence of unconstitutional police behavior requires departure from the state tort rule in federal civil rights cases. There must be widespread police awareness that arrests made without probable cause will provide the basis for subsequent civil litigation—regardless of the ultimate fate of the individual arrested.

The decision below found that the exclusionary rule (*i.e.*, the rule that excludes from admission at criminal trials evidence unlawfully obtained) is sufficient to deter law enforcement officers from making improper arrests. False arrests often constitute more onerous civil rights violations than improper searches. Moreover, the exclusionary rule provides no remedy at all for a person falsely arrested but from whom no evidence is seized pursuant to the arrest. Finally, courts are increasingly unwilling to exclude evidence due to the social cost of failing to convict those correctly accused of crimes. A civil remedy that does not prevent conviction provides for deterrence without exacting the same social cost.

This Court has recently reiterated its belief in the usefulness of civil remedies for constitutional violations as compared to the cost of excluding evidence obtained because of the wrongful act:

> While we believe the exclusionary rule serves a necessary purpose, it obviously does so at a considerable cost to society as a whole, because it excludes evidence probative of guilt. On the other hand, a damages remedy for an arrest following an objectively unreasonable request for a warrant imposes a cost directly on the officer responsible for the unreasonable request, without the side effect of hampering a criminal prosecution.

Malley v. *Briggs*, 106 S. Ct. 1092, 1098 (1986); *see also Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411-27 (1971) (dissenting opinion of Burger, C.J., advocating damage remedy in lieu of exclusionary rule for violating Fourth Amendment rights).

In sharp contrast to the constitutional safeguards embodied in § 1983, state tort law is not concerned about deterring false arrests—indeed, quite the opposite. The state tort rule reflects a barely-veiled bias *in favor of* encouraging illegal, but successful, police behavior. This policy flouts the deterrent objective of the federal civil rights law, and has no place in § 1983 jurisprudence.

Protection of Civil Rights

In addition to deterring police abuse, § 1983 is designed to protect the civil rights of all our citizens and to provide a remedy for those injured by violation of their civil rights.

By requiring probable cause for arrests, our society has made a judgment: that an individual need not fear being arbitrarily picked up by the police merely because he or she looks suspicious or different to a police officer. *Dunaway* v. *New York*, 442 U.S. 200, 213-14 (1979); *Henry* v. *United States*, 361 U.S. 98, 100-02 (1959). That liberty, guaranteed by the Fourteenth Amendment, is enforceable under § 1983. *Wilson* v. *Garcia*, 471 U.S. 261, 278 (1985).

This Court has emphasized the importance of providing a remedy to victims of unconstitutional official action:

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . . . [M]any victims of municipal malfeasance would be left remediless if [municipalities] were . . . allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated.

Owen v. *City of Independence*, 445 U.S. 622, 651 (1980) (denying municipalities a qualified immunity for good-faith constitutional violations).

The same refusal to deny a remedy to victims of constitutional deprivation was repeated by the Court in *Bivens*. There, the Court relied on the absence of an adequate state tort remedy in allowing a cause of action for damages grounded directly in the Constitution:

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. . . . [It is] well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

403 U.S. at 392, 396, (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). *See also Burnett* v. *Grattan*, 468 U.S. 42, 55 (1984) ("the central objective of the Reconstruction-era civil rights statutes [is] to ensure that individuals whose federal Constitutional or statutory rights are abridged may recover damages or secure injunctive relief").

The court below was mistaken in dismissing an arrest without probable cause as insubstantial. Any deprivation of liberty—no less an arrest on a hunch—is a significant intrusion and deserves a remedy. Unlawful detentions, of even short periods of time, have been found to justify damage awards. *See, e.g., Raysor* v. *Port Authority of New York and New Jersey*, 768 F.2d 34, 39 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1227 (1986). An unlawful arrest followed by detention for hours, or potentially days, while the police gather evidence to justify the arrest and ultimately to convict, is an egregious deprivation of constitutional rights and should not be countenanced under § 1983.

II.

The Decision Below Conflicts With This Court's Opinion in *Haring* v. *Prosise*

In *Haring* v. *Prosise*, 462 U.S. 306 (1983), this Court unanimously upheld a § 1983 damage action for an allegedly illegal search that led to a guilty plea. This Court expressly rejected the defendant's argument that plaintiff's guilty plea precluded a § 1983 action based on the illegal search, even though the search had uncovered the evidence that formed the basis of plaintiff's conviction. *Id.* at 317-23.

The logic of *Haring* applies squarely to this case. If a guilty plaintiff may sue under § 1983 for an illegal search, he should *a fortiori* be permitted to sue for an illegal arrest. *See Brown* v. *Edwards*, 721 F.2d 1442, 1449 n.8 (5th Cir. 1984) (Supreme Court's refusal to preclude suit in *Haring* "arguably points away from the [common law tort rule as to false arrests]").

III.

The Decision Below Conflicts with Decisions of Other Circuit Courts and State Courts

The decision below, along with a similar ruling by the District of Columbia Circuit,[1] conflicts with decisions and reasoning by the First, Fifth, Sixth and Ninth Circuits, as well as a decision of the Supreme Court of California.

In contrast to the decision below, the Sixth Circuit refused to dismiss a § 1983 complaint of false arrest merely because the plaintiff was later convicted. *Mulligan* v. *Schlacter*, 389 F.2d 231 (6th Cir. 1968) (*per curiam*). While the court went on to dismiss the case on statute of limitation grounds, it first ruled that a criminal conviction did not mandate dismissal, stating,

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1 *McClam* v. *Barry*, 697 F.2d 366 (D.C. Cir. 1983), *overruled on other grounds*, *Brown* v. *United States*, 742 F.2d 1498 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1073 (1985).

"the simple fact of an unreversed state conviction cannot by itself require dismissal [of a civil rights action]." *Id.* at 233.

The Fifth Circuit, like the Sixth Circuit, contradicts the decision below. The Fifth Circuit reversed and remanded a dismissal of a § 1983 complaint for false arrest and detention, despite the plaintiff's criminal conviction, writing, "our disposition of Greer's appeal [affirming his criminal conviction] did not resolve the false arrest and detention argument against Greer." *Greer* v. *Turner*, 603 F.2d 521, 522 (5th Cir. 1979), *after remand*, 639 F.2d 229 (5th Cir. 1981) (*per curiam*) (dismissing complaint because plaintiff failed to prove lack of probable cause for arrest). *See Brown* v. *Edwards*, 721 F.2d 1442, 1449 n.8 (5th Cir. 1984) ("the *result* in cases such as *Greer* . . . appears inconsistent with such a bar [based on a conviction] as to section 1983 complaints respecting the arrest").

Similarly, the First Circuit in an analogous situation also contradicts the decision below. *Guerro* v. *Mulhearn*, 498 F.2d 1249 (1st Cir. 1974). The First Circuit declared:

> A denial of constitutionally protected rights may have occurred in the course of the events leading up to trial, yet may only be marginally relevant, or may even be entirely irrelevant, to the trial and appeal. For example, *a false arrest*, or an illegal search and seizure, or wiretap, *may constitute a compensable wrong while not undergirding the validity of the criminal conviction to which it might be related*. In such a situation, both the right infringed and the measure of the compensable damage may be assayed wholly apart from the question of whether conviction was proper.

Id. at 1254 (emphasis added). The First Circuit, while dismissing part of the complaint, remanded the § 1983 damage claim for an illegal wiretap, refusing to dismiss this part of the claim even though a state proceeding for review of plaintiff's criminal conviction was pending. *See also Mastracchio* v. *Ricci*, 498

F.2d 1257, 1261 n.3 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) ("For example, it might be claimed that . . . freedom from pretrial incarceration ha[s] been infringed, and th[is] could constitute compensable wrongs wholly apart from the question of the constitutional validity of conviction.").

Similarly, the rationale of the Ninth Circuit in *Jackson* v. *Official Representatives and Employees of the Los Angeles Police Dep't*, 487 F.2d 885 (9th Cir. 1973) (*per curiam*), cannot be reconciled with the decision below. There, the Ninth Circuit remanded a § 1983 claim of illegal search of a home for further fact-finding, while dismissing claims of false arrest and illegal search of an automobile because facts showed there was probable cause.

There is thus a conflict among the circuits on an important issue of federal civil rights law.

Moreover, there is also a conflict under § 1983 because of different state laws. For example, in New York, once convicted, a plaintiff is not permitted to bring a tort suit for false arrest. *See Broughton* v. *State*, 37 N.Y.2d 451, 355 N.E.2d 310, 373 N.Y.S.2d 87 (1975), *cert. denied*, 423 U.S. 929 (1978); *Morgan* v. *New York Central R.R. Co.*, 256 A.D. 177, 9 N.Y.S.2d 339 (1st Dept. 1939). In California, exactly the opposite rule holds—a conviction does not prevent a plaintiff from suing for false arrest. *Singleton* v. *Perry*, 45 Cal. 2d 489, 289 P.2d 794 (1955) ("the form of action is based upon an illegal arrest and no matter *ex post facto* can legalize an act which was illegal at the time it was done"). Federal constitutional rights should not be allowed to vary from state to state.

Conclusion

For the foregoing reasons, petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

March 2, 1987

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 684—August Term, 1985

(Argued January 29, 1986 Decided December 1, 1986)

Docket No. 85-2297

KENNETH S. CAMERON,
Plaintiff-Appellant,

— v. —

MATTHEW FOGARTY and JOHN HALBIG,
Defendants-Appellees.

Before:

NEWMAN, KEARSE, and MINER,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Edward R.

Neaher, *Judge*, dismissing complaint under 42 U.S.C. § 1983 for unlawful arrest without probable cause, on the ground that suit is barred by plaintiff's conviction of offense for which he was arrested.

Affirmed.

STEVEN R. POPOFSKY, New York, New York, (Diana Hassel, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, on the brief), *for Plaintiff-Appellant.*

ELIZABETH DVORKIN, New York, New York (Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York, June A. Witterschein, New York, New York, on the brief), *for Defendants-Appellees.*

KEARSE, *Circuit Judge*:

Plaintiff Kenneth S. Cameron, who was convicted in 1980 in New York State Supreme Court of possession of stolen property following his arrest by defendant police officers Matthew Fogarty and John Halbig, appeals from a judgment of the United States District Court for the Eastern District of New York, Edward R. Neaher, *Judge*, dismissing his amended complaint ("complaint"), brought under 42 U.S.C. § 1983 (1982), seeking damages from defendants on the ground that they had arrested him without probable cause, in violation of his federal constitutional rights. The district court granted defendants' motion for summary judgment dismissing the complaint,

ruling that New York law bars a civil action for arrest without probable cause if the claimant has been convicted of the crime for which he was arrested. On appeal, Cameron argues that New York law should not have been applied, since its application frustrates the purpose of § 1983. Defendants urge that we affirm the dismissal, either on the ground adopted by the district court or on the ground that the claim was barred by principles of collateral estoppel. We conclude that although principles of collateral estoppel do not apply, the judgment should be affirmed because common-law principles incorporated in § 1983 bar the present suit.

I. BACKGROUND

Insofar as it is pertinent to Cameron's claim of false arrest and the propriety of the district court's dismissal of the complaint, the trial record in state court reveals the following events and proceedings.

A. *The Events*

On February 13, 1980, New York City Police Officers Fogarty and Halbig observed Cameron, driving a car with Illinois license plates and a broken left rear vent window, make an illegal right turn through a red light on 111th Street in Manhattan and park illegally at a bus stop on Eighth Avenue. Cameron and his passenger, Anthony Wilson, left the car and began to walk away from it. Because of the illegal right turn and because the broken vent window caused them to suspect that the car might have been stolen, the officers pulled alongside the car and hailed Cameron, identifying themselves as police officers.

When asked for identification of himself and his vehicle, Cameron produced a Virginia driver's license bearing

his photograph and the name Sammy Davis, Jr., and a carbon copy of a Hertz Corporation ("Hertz") car rental agreement made out to Jenne M. Currie, whom Cameron identified as his aunt. The agreement indicated that the car was to have been returned to Hertz on February 3. Cameron told the officers that the car window had been broken recently, that he had reported it to Hertz at Newark Airport, and that he had there been added to the rental agreement as a driver. The copy of the rental agreement bore handwritten notations in ink that Sammy Davis, Jr., was an authorized additional driver and that an accident report had been filed at Newark Airport.

In the minute or two between noticing Cameron's car and stopping alongside it, the officers had radioed police headquarters for information as to whether the car had been reported stolen, but had received no response. After questioning Cameron they remained suspicious because of the broken window, the notations inked in on the rental agreement, and the apparent overdue return of the car, and they decided to go to the police station to investigate further. Cameron and Wilson rode with Fogarty in the police car; Halbig drove the rental car.

At the station house, Cameron identified himself as Kenneth Cameron and showed Fogarty a passport in that name. He also produced an airline ticket to Barbados made out to K. Cameron, a social security card bearing the name Sammy Davis, Jr., and four state child support checks made out to Giovanni Stanislaus, who he said was his child.

Halbig telephoned Hertz to inquire about the car. Hertz employees informed both Halbig and Fogarty that the car was stolen, having been fraudulently rented at O'Hare Airport in Chicago. The employees also stated that Hertz

did not authorize additional drivers in the manner indicated on Cameron's rental agreement and that no accident report had been filed.

Cameron was then placed under arrest and charged with several offenses including grand larceny, criminal impersonation, and criminal possession of stolen property.

B. *The Criminal Trial*

At trial, the state's evidence included Fogarty's testimony describing the events as set forth above. When Fogarty was asked what statements Cameron had made about the license and the rental agreement when he produced those documents on the street, Cameron's counsel requested a sidebar conference, which included the following colloquy:

> MR. DOCKRY [counsel for Cameron]: I would call to the Court's attention statements are now being proffered, statements allegedly made by the defendant.
>
> It woud [*sic*] seem I am going to run into the area of rights.
>
> I would just ask the District Attorney to clarify the rights issue and the Miranda issue.
>
> I am relatively certain it is all quite proper, but nonetheless.
>
> THE COURT: Number one, I assume that the contention is that this is not a custodial interrogation.
>
> MR. DOCKRY: At this stage.
>
> MR. BARBER [the prosecutor]: That is entirely correct.

(Tr. 184-85.) The Sammy Davis, Jr. driver's license was then introduced into evidence without objection by Cameron. The rental agreement had been received in evidence earlier, also without objection by Cameron.

The social security card, the child-support checks, and the airline ticket were received in evidence subject to Cameron's counsel's "reserv[ation of an] objection" as to those documents. The reserved objections were overruled when, during Cameron's cross-examination of Fogarty, they were renewed in the following colloquy:

> MR. DOCKRY: I hate to bother the Court with what may be a trifling matter.
>
> You recall in a brief bench conference this mroning [*sic*], in the course of the officer's testimony who is about to resume the stand, I asked to make very sure that the search which was to follow at the police station and the statements then taken, and all these things, that those would be probably [*sic*—properly?] structured.
>
> The Court permitted me to wait until it became more timely.
>
> Thereafter when these things were introduced into evidence I took objection and I also asked the Court to give me permission to renew an objection on a later date after cross examination.
>
> But at this point it must be clear that the items that were introduced have not been properly foundationed with respect to the propriety of such a thing as admissible evidence in this case.
>
> I would therefore ask—

THE COURT: Based on the evidence I heard from this officer, the specific exhibits, driver's license, airline ticket, other property were the incidents of a lawful arrest.

Under the circumstances they were properly admissible.

There were no pretrial motions to suppress. I don't know what the basis would have been in making one, under the circumstances of this case.

It is clear, after the defendant had been arrested, I assume he was searched, and those properties were the consequence of an arrest.

MR. DOCKRY: Thank you, sir. Now I am ready to proceed.

(Tr. 214-16.)

Cameron was convicted of first degree criminal possession of stolen property, in violation of N.Y. Penal Law § 165.50 (McKinney 1975). He appealed the conviction, but did not challenge the admissibility of any evidence against him. His conviction was affirmed without opinion. *People v. Cameron*, 86 A.D.2d 783 (1st Dept), *leave to appeal denied*, 56 N.Y.2d 595 (1982).

C. *The Present Amended Complaint*

In February 1982, Cameron commenced the present action *pro se*, alleging that the defendants had arrested him in violation of his constitutional rights and seeking damages under 42 U.S.C. § 1983. The district court's early dismissal of the action was reversed by this Court as premature, *Cameron v. Fogarty*, 705 F.2d 676 (2d Cir. 1983), and on remand, counsel was assigned and filed the

complaint that is the focus of this appeal. Cameron alleged that his arrest took place on Eighth Avenue when he was required to accompany the officers to the police station, and that the arrest violated his constitutional rights because at that time the officers lacked probable cause to believe that a crime had occurred or that he had committed it and lacked any good faith belief that probable cause existed for his arrest.

Defendants answered and moved for summary judgment on the ground that the state court's ruling that the evidence was admissible at Cameron's criminal trial because it had been obtained in a search incident to a lawful arrest necessarily included a finding that there had been probable cause to make the arrest, and that Cameron's claim was therefore barred by principles of collateral estoppel.

In a Memorandum Order dated August 19, 1985 ("Decision"), the district court granted defendants' motion for summary judgment on the ground that, even if the issue of probable cause to arrest had not been raised and rejected at the criminal trial, under New York common law Cameron's conviction barred his subsequent civil suit for arrest without probable cause. Reasoning that a claim under New York law for false arrest or false imprisonment would be barred by a conviction of the offense for which the arrest or imprisonment occurred, Decision at 6 (citing *Broughton v. State*, 37 N.Y.2d 451, 458, 373 N.Y.S.2d 87, 95, *cert. denied*, 423 U.S. 929 (1975)), and that a § 1983 claim alleging an arrest without probable cause is similar to a state law claim for false arrest, Decision at 6 (citing *Raysor v. Port Authority*, 768 F.2d 34 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1227 (1986)), the court concluded that

> [g]iven the similarities in the state and federal claims here, logic would dictate that plaintiff's state conviction would also bar a federal claim asserting the absence of probable cause to arrest. . . .
>
> . . . .
>
> . . . Although the court's ruling that plaintiff's conviction bars the instant suit is not based upon collateral estoppel per se, *see Pouncey* v. *Ryan,* 396 F. Supp. 126, 128 n. 2 (D.Conn. 1975), "* * * the preclusion mandated for state court judgments by section 1738 is not expressly restricted to that achieved under the '*res judicata*' or 'collateral estoppel' labels; * * *." *Brown* v. *Edwards,* 721 F.2d 1442, 1449 n.8 (5th Cir. 1984) (emphasis in original). Thus, although a finding of probable cause to arrest was not necessary to sustain plaintiff's conviction, *see United States* v. *Crews,* 445 U.S. 463, 474 (1980), under the law of New York, that conviction, sustained on appeal, necessarily includes a finding that there was probable cause to arrest and thereby bars a subsequent civil suit challenging the existence of probable cause for the arrest.

Decision at 7-8.

Accordingly, the court dismissed the complaint. This appeal followed.

II. DISCUSSION

On appeal, defendants urge us to uphold the dismissal of the action either on the ground of collateral estoppel or on the state-law-bar ground adopted by the district court. Cameron argues that the conditions for application of principles of collateral estoppel are not met and that the state-law-bar ground is contrary to federal policy. We

agree with Cameron that litigation of the issue raised here as to probable cause is not barred by principles of collateral estoppel, but we conclude that under common-law principles, as properly incorporated into § 1983 actions of this type, Cameron's present lawsuit is defeated by his prior conviction.

A. *Collateral Estoppel*

Section 1738 of 28 U.S.C., known as the "full faith and credit statute," provides, in pertinent part, as follows:

> The records and judicial proceedings of any court of any . . . State [of the United States] . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . .

28 U.S.C. § 1738 (1982). This section requires that a federal court give effect to at least the res judicata and collateral estoppel rules of the state when a state-court judgment is in question. *See Marrese v. American Academy of Orthopaedic Surgeons,* 105 S. Ct. 1327, 1331-33 (1985). The state-court judgment must be given "the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered," *Migra v. Warren City School District Board of Education,* 465 U.S. 75, 81 (1984), whether that preclusive effect stems from the actual litigation and resolution of the issue in a prior state court proceeding, *Haring v. Prosise,* 462 U.S. 306, 313-16 (1983); *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 481-83 (1982); *Allen v. McCurry,* 449 U.S. 90, 97-99, 101 (1980), or from the fact that the issue could have been litigated in the state court proceeding, *Migra v. Warren County School District Board of Education,* 465 U.S. at 83-85.

Under New York law, a party is collaterally estopped from relitigating an issue in a second proceeding if (1) "the issue as to which preclusion is sought [is] identical with the issue decided in the prior proceeding," (2) "the issue [was] necessarily decided in the prior proceeding," and (3) "the litigant who will be held precluded in the present proceeding . . . had a full and fair opportunity to litigate the issue in the prior proceeding." *Capital Telephone Co. v. Pattersonville Telephone Co.*, 56 N.Y.2d 11, 17, 451 N.Y.S.2d 11, 13 (1982). Defendants argue that the issue of probable cause for Cameron's arrest was decided at his criminal trial because the trial court ruled that various pieces of evidence were admissible because they were seized as incident to a lawful arrest. Since the arrest was made without a warrant and hence was not lawful unless there was probable cause, *see, e.g., Dunaway v. New York*, 442 U.S. 200, 208 & n.9 (1979), they argue that the trial court decided there had been probable cause for the arrest. We conclude that the issue decided at the criminal trial is not the issue presented here.

The testimony at trial revealed that some of the documentary evidence introduced against Cameron had been taken from him on the street, and some had been taken later. The Sammy Davis, Jr. driver's license and the rental agreement were produced by Cameron when he was accosted by the officers on the street. These two documents were received in evidence without objection from Cameron. Cameron did not argue at the criminal trial, as he does in the present action, that his arrest occurred on Eighth Avenue. At the trial, Fogarty testified that Cameron was placed under arrest at the station house after the officers had received the information from Hertz indicating that the car had been stolen, and Cameron took no issue with Fogarty's characterization of when the arrest

occurred, apparently embracing the view that the circumstances on the street were "not . . . custodial." (Tr. 185.)

In contrast, the social security card in the name Sammy Davis, Jr., the airline ticket for K. Cameron, and the state child support checks for Giovanni Stanislaus were not produced by Cameron until after he and the officers arrived at the station house. Cameron objected to the introduction of "these things," focusing on "the search . . . at the police station." (Tr. 215.) As we read the trial record, therefore, the trial court was never called upon to determine either the moment at which the arrest occurred or whether an arrest of Cameron on Eighth Avenue was made with or without probable cause. Give the apparently undisputed trial testimony that Cameron was not placed under arrest until after he arrived at the station house, and the fact that Cameron objected only with respect to the documents seized at the police station, the trial court's ruling that the documents were the incidents of a lawful arrest cannot reasonably be construed as a ruling that Cameron was lawfully arrested on Eighth Avenue.

It is true that in overruling the objections the trial court included the driver's license, which had been taken from Cameron on the street, in its listing of the items that were seized incident to a lawful arrest. However, given the facts that no objection had been made to the introduction of the license and that the court had earlier assumed and been reassured by the parties that the street confrontation was not custodial, we conclude that the court's mention of the license simply reflects a lapse of memory as to what counsel's phrase "these things" encompassed, rather than any intent to rule that the arrest had occurred on the street or that probable cause existed for Cameron's arrest on the street.

Accordingly, we conclude that the issue raised in the present lawsuit, *i.e.*, the existence of probable cause to arrest Cameron on Eighth Avenue, was neither decided by the court at the criminal trial nor necessary to its ruling that the documents to which Cameron's objection was addressed had been seized in connection with an arrest made on probable cause. Thus, litigation in the present lawsuit of the existence of probable cause to arrest Cameron on Eighth Avenue is not barred by principles of collateral estoppel.

B. *The Common-Law Defense*

The district court dismissed Cameron's complaint on the basis that even if New York principles of collateral estoppel did not warrant the dismissal of the complaint, § 1738 required it to apply that aspect of New York law that would give preclusive effect to the judgment of conviction in any subsequent civil challenge to the legality of the arrest. While there are dicta supporting the view that the reach of § 1738 is not limited to principles of res judicata and collateral estoppel, *see, e.g., Allen v. McCurry*, 449 U.S. at 96 ("Congress has specifically required all federal courts to give preclusive effect to state-court judgments *whenever* the courts of the State from which the judgments emerged would do so") (emphasis added), we need not reach the question of whether § 1738 requires the recognition of state-law preclusionary rules other than res judicata and collateral estoppel in order to decide the present case, for we conclude that Cameron's complaint was properly dismissed because under long-established common-law principles, Cameron's conviction gives the defendant police officers a complete defense to the present claim.

In determining whether an asserted defense is available to defeat liability in an action brought under § 1983, the courts have generally been guided in large part by whether the defense was available at common law. In *Pierson v. Ray*, 386 U.S. 547 (1967), for example, the Supreme Court, stating that "§ 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions,' " *id.* at 556 (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)), reviewed traditional principles with respect to the immunity of judges and law enforcement officials from suits for damages resulting from arrests, noted that the legislative history of § 1983 gave no clear indication that Congress intended any wholesale abolition of common-law immunities that might bar suits under that section, and concluded that those common-law defenses were available. *Id.* at 553-56. Similar analyses were made in, *e.g.*, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-68 (1981) (immunity of municipal corporation from punitive damages); *Procunier v. Navarette*, 434 U.S. 555, 561-63 (1978) (immunity of prision officials for good faith actions); *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (immunity of prosecutors in initiating or prosecuting the state's case); and *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974) (immunity of state executive officials for discretionary acts). Thus, in *Owen v. City of Independence*, 445 U.S. 622 (1980), the Supreme Court cited many of these cases and others, and noted that

> [i]n each of these cases, our finding of § 1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman, supra*, at 421. Where the immunity claimed by the defendant was well established at

> common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity.

Id. at 638.

Our review of common-law principles with respect to arrest reveals that an action for arrest without probable cause, sometimes colloquially called an action for "false arrest," would be analyzed as a claim either for false imprisonment or for malicious prosecution. *See, e.g., Broughton v. State,* 37 N.Y.2d at 457-58, 373 N.Y.S.2d at 94; 1 Harper & James, *The Law of Torts* § 4.11, at 337-39 (1965) ("Harper & James"). Though the elements of these two traditional torts differ, *see, e.g., Broughton v. State,* 37 N.Y.2d at 456-57, 373 N.Y.S.2d at 93-94; Harper & James § 3.18 (false imprisonment); *id.* §§ 4.1-4.6 (malicious prosecution); Restatement (Second) of Torts §§ 35, 653 (1965 & 1977) ("Restatement"), there is substantial overlap. Civil liability for false imprisonment following an arrest is governed by many of the same principles that govern a claim of malicious prosecution, *see* Restatement § 37, comment *b*; *see also* Harper & James § 4.11; *id.* § 4.12, and, as discussed below, it is clear that with respect to either claim, a person who has been convicted of the crime for which he was arrested is barred from recovering.

In an action for malicious prosecution, in which the plaintiff must show the absence of probable cause to arrest, *see* Restatement § 653; *Broughton v. State,* 37 N.Y.2d at 457, 373 N.Y.S.2d at 94; Harper & James § 4.5, at 311, he must also show, *inter alia,* that the proceedings previously commenced against him terminated in his favor, *see, e.g., Broughton v. State,* 37 N.Y.2d at 457, 373

N.Y.S.2d at 94; *Singleton v. City of New York,* 632 F.2d 185, 195 (2d Cir. 1980), *cert. denied,* 450 U.S. 920 (1981); Harper & James § 4.4, at 307. Thus, "[t]he fact that the person against whom criminal proceedings are instituted is guilty of the crime charged against him, is a complete defense against liability for malicious prosecution." Restatement § 657; *see generally* Annot., "Unreversed Conviction as Conclusive in Action for Malicious Prosecution," 69 A.L.R. 1062 (1930) (citing cases dating back to 1793); *see also* Annot., "Conclusiveness, as Evidence of Probable Cause in Malicious Prosecution Action, of Conviction as Affected by the Fact that it Was Reversed or Set Aside," 86 A.L.R.2d 1090 (1962).

In an action for false imprisonment, the plaintiff need not show that the prior proceedings against him terminated in his favor, but the defendant is entitled to prevail if he can establish that there was probable cause for the arrest, *see Broughton v. State,* 37 N.Y.2d at 458, 373 N.Y.S.2d at 95; Restatement § 37, comment *b*; *id.* § 653, and a conviction of the plaintiff following the arrest is viewed as establishing the existence of probable cause. *See Broughton v. State,* 37 N.Y.2d at 458, 373 N.Y.S.2d at 95 ("a conviction which survives appeal would be conclusive evidence of probable cause"); *Menard v. Mitchell,* 430 F.2d 486, 491 n.26 (D.C. Cir. 1970) ("even if no probable cause existed at the time of arrest, ... a suit for false arrest may not normally be maintained if the arrest was followed by conviction, regardless of the validity of the arrest at the time it was made"); *Pouncey v. Ryan,* 396 F. Supp. 126, 127 (D. Conn. 1975) (Newman, *J.*) (in neither an action for "false arrest" nor an action for "false imprisonment ... is a plaintiff permitted to challenge probable cause in the face of a valid judgment of conviction"); Restatement § 667(1) ("conviction of the accused ... con-

clusively establishes the existence of probable cause, unless the conviction was obtained by fraud, perjury or other corrupt means"); *see id.* § 37, comment *b*; *id.* § 653.

Thus, the common-law rule, equally applicable to actions asserting false arrest, false imprisonment, or malicious prosecution, was and is that the plaintiff can under no circumstances recover if he was convicted of the offense for which he was arrested. *Broughton v. State,* 37 N.Y.2d at 458, 373 N.Y.S.2d at 95; Harper & James § 4.11, at 345; *id.* § 4.12, at 346. This rule "represents the compromise between two conflicting interests of the highest order—the interest in personal liberty and the interest in apprehension of criminals," *id.* § 3.18, at 275, and constitutes a refusal as a matter of principle to permit any inference that the arrest of a person thereafter adjudged guilty had no reasonable basis. The law enforcement officer is given this protection because he "has a duty to the public to prevent crime and arrest criminals; the performance of these duties would be seriously impaired unless peace officers were given considerable discretion in their performance and protected from liability for the consequences of honest and reasonable mistakes." Restatement § 121, comment *g.*

The parties have given us no basis for inferring that Congress intended that § 1983 not incorporate the common-law rule, and our own efforts have turned up no such evidence. We note the Supreme Court's "assumption . . . that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary," *City of Newport v. Fact Concerts, Inc.,* 453 U.S. at 258, and we see no reason

to believe Congress intended that the common-law defense of conviction not be equally applicable to § 1983 claims for arrest without probable cause.

Where the civil rights plaintiff has been convicted of the offense for which he was arrested, we have in effect accepted the fact of that conviction as conclusive evidence of the good faith and reasonableness of the officer's belief in the lawfulness of the arrest. *See, e.g., Singleton v. City of New York,* 632 F.2d at 195 ("common law rule that termination of the earlier proceedings in favor of the accused is an essential element of a malicious prosecution claim has generally been adopted and applied by federal courts" in actions under § 1983). Thus, in *Pouncey v. Ryan,* 396 F. Supp. at 127, the court summarily dismissed a § 1983 action based on an arrest without probable cause, concluding that the common-law principle barring post-conviction suits for false arrest and false imprisonment was applicable to this type of action under § 1983.

The availability of this defense in constitutional litigation does not undermine the goals of § 1983. Provision for the right to bring suit under § 1983 is designed both to allow an injured person to obtain compensation for the loss of his civil rights and to deter public officials from further violation of such rights. *E.g., Owen v. City of Independence,* 445 U.S. at 651; *Carey v. Piphus,* 435 U.S. 247, 254-57 (1978). Neither interest is more than minimally implicated where the person arrested was convicted. The fact of conviction means that the plaintiff was not entitled to escape arrest entirely and that the arrest was simply premature. Though the right to be free from arrest without probable cause is substantial, the injury caused solely by prematurity of arrest is, of itself, insubstantial. It is of course possible that, incident to the premature arrest, the

officers will have seized evidence that incriminates the person arrested, and that this could result in more than negligible injury. But the law seeks to forestall the possibility of real injury by forbidding the use of any such evidence against the accused at his criminal trial. *See, e.g., Florida v. Royer,* 460 U.S. 491, 507-08 (1983); *Brown v. Illinois,* 422 U.S. 590, 599 (1975). Thus, the exclusionary rule minimizes the injury resulting from an unlawful arrest.

The exclusionary rule also lessens the need for § 1983 actions as a deterrent to the making of arrests on less than probable cause. The primary goal of law enforcement officers is to see to it that persons who have committed crimes are punished for those crimes, and we think officers seek to avoid making flawed arrests in order to avoid the exclusion of evidence that could lead to conviction. We are thus persuaded that the incremental deterrence value of imposing on the officer liability for the minimal amount of damages likely recoverable by the person convicted after an unlawful arrest would be small.

In sum, we conclude that the proper accommodation between the individual's interest in preventing unwarranted intrusions into his liberty and society's interest in encouraging the apprehension of criminals requires that § 1983 doctrine be deemed, in the absence of any indication that Congress intended otherwise, to incorporate the common-law principle that, where law enforcement officers have made an arrest, the resulting conviction is a defense to a § 1983 action asserting that the arrest was made without probable cause.

Application of this principle to the present action makes it plain that the dismissal of the complaint was proper. Cameron concedes, as he must, that he was con-

victed of criminal possession of stolen property, the offense for which he was arrested. The conviction was affirmed on appeal, and there has been no suggestion that it was in any way procured by fraud or perjury. Whether or not the facts surrounding the officers' encounter with Cameron on Eighth Avenue amounted to probable cause for his arrest, the conviction of Cameron of the offense for which he was arrested gives the officers a complete defense to the present suit.

CONCLUSION

For the foregoing reasons, the judgment dismissing the complaint is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

82 CV 457
(ERN)

KENNETH S. CAMERON,

Plaintiff,

—against—

MATTHEW FOGARTY and JOHN HALBIG,

Defendants.

MEMORANDUM ORDER

Plaintiff invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1343 to seek redress under 42 U.S.C. § 1983 for an arrest allegedly made by two New York City police officers without probable cause. The case is before the Court upon defendants' motion to amend the answer to assert the defense of collateral estoppel and coincident motion for summary judgment upon that defense.

The transcript of a state criminal trial, in which plaintiff was convicted of possession of stolen property, provides the basis for defendants' motion. They contend that the existence of probable cause to arrest plaintiff was determined in that trial and bars the instant suit.

The trial record reveals that plaintiff was convicted of possessing a stolen automobile, which had been rented by his girlfriend from a Hertz facility at Chicago's O'Hare airport, using a false identification. Plaintiff was later apprehended by defendant police officers in Manhattan after he failed to stop for a red light and then parked the stolen vehicle in a bus stop. At trial the following colloquy occurred regarding the arrest of the plaintiff and the search of his person for evidentiary items.

"MR. DOCKERY: I hate to bother the Court with what may be a trifling matter.

"You recall in a brief bench conference this morning, in the course of the officer's [Fogarty's] testimony who is about to resume the stand, I asked to make very sure that the search which was to follow at the police station and the statements then taken, and all these things, that those would be probably [sic] structured.

"The Court permitted me to wait until it became more timely.

"Thereafter when these things were introduced into evidence I took objection and I also asked the Court to give me permission to renew an objection on a later date after cross-examination.

"But at this point it must be clear that the items that were introduced have not been properly foundationed with respect to the propriety of such a thing as admissible evidence in this case.

"I would therefore ask—

"THE COURT: Based on the evidence I heard from this officer, the specific exhibits, driver's license, airline ticket, other property were the incidents of a lawful arrest.

"Under the circumstances they were properly admissible.

"There were no pretrial motions to suppress. I don't know what the basis would have been in making one, under the circumstances of this case.

"It is clear, after the defendant had been arrested, I assume he was searched, and those properties were the consequence of an arrest."

"MR. DOCKERY: Thank you sir. Now I am ready to proceed."

Tr. at 214-16 (emphasis added).

On the basis of that ruling, defendants contend that the issue of the existence of probable cause to arrest plaintiff was determined adversely to him, noting that

> "* * * 'New York has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.' "

See Gilberg v. *Barbieri*, 53 N.Y.2d 285, 291 (1981) (quoting *Schwartz* v. *Public Administrator, etc.*, 24 N.Y.2d 65, 71 (1969)); *accord Murphy* v. *Gallagher*, 761 F.2d 878, 882 (2d Cir. 1985).

In *Allen* v. *McCurry*, 449 U.S. 90 (1980), however, the Supreme Court had recognized that determinations and judgments rendered upon matters in issue in state criminal proceedings may have collateral consequences in a subsequent civil suit brought under 42 U.S.C. § 1983. Thereafter, in *Haring* v. *Prosise*, 103 S. Ct. 2368 (1983), which concerned a claim that Virginia police officers had searched the accused's apartment without probable cause, and seized materials used to manufacture a controlled substance, phencyclidine, the Court disposed of the officers' contention that the accused's (plaintiff's) guilty plea to one count of manufacturing a controlled substance collaterally estopped his § 1983 suit. The Court stated,

> "We begin by reviewing the principles governing our determination whether a § 1983 claimant will be collaterally estopped from litigating an issue on the basis of a prior state-court judgment. Section 28 U.S.C. § 1738 generally requires 'federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.' In federal actions including § 1983 actions, a state-court judgment will not be given collateral estoppel effect, however, where 'the party against whom an earlier court

> decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.' Moreover, additional exceptions to collateral estoppel may be warranted in § 1983 actions in light of the 'understanding of § 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights.'
>
> "The threshold question is whether under the rules of collateral estoppel applied by the Virginia courts, the judgment of conviction based upon Prosise's guilty plea would foreclose him in a later civil action from challenging the legality of a search which had produced inculpatory evidence."

The teaching of *Prosise supra*, however, which is derived from the mandate of 28 U.S.C. § 1738 and thus stems from the law of Virginia, suggests a different basis for judgment in this case. Unlike New York, in the courts of Virginia, with one exception not relevent to this case, "criminal judgments, whether by guilty plea or adjudicated guilt, have no preclusive effect in subsequent civil litigation." *Prosise* v. *Haring*, 667 F.2d 1133, 1139 (4th Cir. 1981), *aff'd* 103 S. Ct. 2368 (discussed therein). As the Court of Appeals noted, Virginia's rule against preclusion by criminal judgments rests upon the mutuality requirement, *id.* at 1139 n. 5, which is no longer part of New York's law of collateral estoppel. *Gilberg, supra*, 53 N.Y.2d at 291-92. ("The rejection of the mutuality principle in civil actions also undermined the rule, which had long prevailed in this State, that a conviction in a criminal case could not be given conclusive effect in a subsequent civil suit. That rule was abandoned in 1973." (citations omitted)).

Under the law of New York, in an action for false arrest or false imprisonment, a conviction which survives appeal is conclusive evidence of probable cause. *Broughton* v. *State*, 37 N.Y.2d 451, 458 (1975), *cert. denied sub. nom. Schanbarger* v. *Kellogg*, 423 U.S. 829 (1975). While § 1983 creates a federal cause of action, *Allen, supra*, 449 U.S. at 98, the allegation of

an arrest without probable cause under 42 U.S.C. § 1983, see amended complaint ¶ 24, has been found similar, if not identical to a state law claim for false arrest. *See Raysor* v. *Port Authority, etc.*, ____ F.2d ____, ____ (2d Cir. July 15, 1985).

In this case, the amended complaint contains no state claim and specifically alleges:

> "25. Plaintiff has no remedy for the violation by defendants of his rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution under the laws of the State of New York."

That allegation implicitly acknowledges that plaintiff's conviction and unsuccessful appeals to the Appellate Division and the New York Court of Appeals, see amended complaint ¶ 22, bar a state law action for false arrest. In such an action, because the arrest is warrantless, the defendants bear the burden of demonstrating reasonable cause for the arrest, *Broughton, supra*, 37 N.Y.2d at 457-58, which is the equivalent of probable cause. *Raysor, supra*. This same rule applies to a § 1983 action predicated upon a warrantless arrest. *Gilker* v. *Baker*, 576 F.2d 245, 246 (9th Cir. 1978). Given the similarities in the state and federal claims here, logic would dictate that plaintiff's state conviction would also bar a federal claim asserting the absence of probable cause to arrest. *See McCalm* v. *Barry*, 697 F.2d 366, 370-71 (D.C.Cir. 1983) (discussion therein); *Martin* v. *Delcambre*, 578 F.2d 1164, 1165 (5th Cir. 1978) (per curiam); *see also Alexander* v. *City of Peekskill*, 80 A.D.2d 626, 436 N.Y.S.2d 327, 328 (2d Dept. 1981).

In reversing this Court's prior dismissal of this case, the Court of Appeals stated,

> "[W]e do not address the issue whether a conviction bars a subsequent civil rights claim based on lack of probable cause to arrest, or whether under the principles of *Allen* v. *McCurry*, 449 U.S. 90, 103-04 (1980), appellant may be barred by collateral estoppel."

Cameron v. *Fogarty*, 705 F.2d 676, 678-79 (2d Cir. 1983).

With the benefit of the amended complaint drafted by a court-appointed attorney and the teaching of *Haring, supra*, the Court has addressed this issue. Although the court's ruling that plaintiff's conviction bars the instant suit is not based upon collateral estoppel per se, *see Pouncey* v. *Ryan*, 396 F. Supp., 126, 128 n. 2 (D.Conn 1975), "* * * the preclusion mandated for state court judgments by section 1738 is not expressly restricted to that achieved under the '*res judicata*' or 'collateral estoppel' labels; * * *." *Brown* v. *Edwards*, 721 F.2d 1442, 1449 n. 8 (5th Cir. 1984) (emphasis in original). Thus, although a finding of probable cause to arrest was not necessary to sustain plaintiff's conviction, *see United States* v. *Crews*, 445 U.S. 463, 474 (1980), under the law of New York, that conviction, sustained on appeal, necessarily includes a finding that there was probable cause to arrest and thereby bars a subsequent civil suit challenging the existence of probable cause for the arrest.

Accordingly, defendants' motion to amend the answer is granted, defendants' motion for summary judgment is granted, and the complaint is dismissed.

SO ORDERED.

Copies of this Memorandum Order are being forwarded to counsel for the parties.

/s/ EDWARD R. NEAHER
U.S.D.J.

Dated: Brooklyn, N.Y.
August 19, 1985

Filed: August 20, 1985

(7)

Supreme Court, U.S.
FILED
MAR 25 1987
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CLERK

No. 86-1402

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

KENNETH S. CAMERON,

Petitioner,

v.

MATTHEW FOGARTY and JOHN HALBIG,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. At common law, a plaintiff's conviction of the crime he or she was arrested for constituted a complete defense to an action for false arrest.

Should the defense be excluded from a false arrest action brought under 42 U.S.C. §1983 when the defense is consistent with the deterrent and compensatory purposes of the Civil Rights Act?

2. Whether the respondent police officers had a legally sufficient basis to detain petitioner until they could check his car's registration?

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No. 86-1402

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

KENNETH S. CAMERON,

Petitioner,

v.

MATTHEW FOGARTY and JOHN HALBIG,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER-STATEMENT OF THE CASE

Petitioner, Kenneth Cameron, was stopped by the respondents, two New York City police officers, while driving in New York City in a car with Illinois license plates

and a broken window (3a).[1] The officers stopped petitioner because he made an illegal right turn and parked illegally at a bus stop and because the broken window suggested the car had been stolen (3a).

When asked for identification, petitioner produced a Virginia driver's license in the name Sammy Davis Jr. and a carbon copy of a Hertz rental agreement made out to Jenne Currie with the name Sammy Davis, Jr. added in handwritten ink as an additional driver (4a). The rental agreement provided that the car would be returned in Chicago ten days earlier (4a).

The officers radioed in to see if the car had been reported stolen but received no response (4a). Because they remained

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[1]Parenthetical references are to the petitioner's appendix.

suspicious, they went to the stationhouse with Cameron to investigate further (4a).

After calling Hertz, the officers learned that the car had been reported stolen (4a). Petitioner was then placed under arrest and charged with, inter alia, criminal possession of stolen property (5a). After a four day jury trial, petitioner was convicted of first degree possession of stolen property (7a). The conviction was affirmed on appeal (7a).

Petitioner then filed a complaint under 42 U.S.C. §1983 alleging that he had been arrested without probable cause (7a). The District Court granted respondents summary judgment and the Court of Appeals for the Second Circuit affirmed (3a, 26a).

1. The District Court Opinion

The District Court relied on two theories in granting respondents summary judgment. First, the Court reasoned that because of the similarity between a common law false arrest action and a section 1983 action alleging an arrest without probable cause, the common law defense of a subsequent conviction on the charge ("conviction bar") should apply to the section 1983 action (25a):

> Given the similarities in the state and federal claims here, logic would dictate that plaintiff's state conviction would also bar a federal claim asserting the absence of probable cause to arrest.

The Court also reasoned that petitioner's claim was precluded under 28 U.S.C. §1738 because under New York law, petitioner's conviction "necessarily includes a finding that there was probable cause to arrest...." (26a).

2. The Second Circuit Opinion

The Court of Appeals unanimously held that the common law conviction bar applies to a section 1983 action alleging arrest without probable cause. In so holding, the Court followed the long line of cases that have held that in enacting section 1983, Congress "likely intended" common law defenses to apply. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981). See, e.g., Monroe v. Pape, 365 U.S. 167, 187 (1961); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974). (14a-15a, 17a-18a).

Relying on Owen v. City of Independence, 445 U.S. 622, 638 (1980), the Court decided that the defense "was well established at common law at the time 1983 was enacted" and that "its rationale was compatible with the purpose of the Civil Rights Act...." (14a-15a).

Application of the defense to section 1983 is, the Court found, appropriate under both the deterrent and compensatory purposes of the Civil Rights Act (18a). Analyzing the arrest as "premature", the Court found that any injury is "insubstantial" (18a). Moreover, the exclusionary rule both "minimizes the injury" caused by a premature arrest and deters such arrests (19a). The Court concluded (19a):

> [T]he proper accommodation between the individual's interest in preventing unwarranted intrusions into his liberty and society's interest in encouraging the apprehension of criminals requires that §1983 doctrine be deemed, in the absence of any indication that Congress intended otherwise, to incorporate the common-law principle that, where law enforcement officers have made an arrest, the resulting conviction is a defense to a §1983 action asserting that the arrest was made without probable cause.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURT'S DECISION FOLLOWED THE APPLICABLE DECISIONS OF THIS COURT AND IS NOT IN CONFLICT WITH THE HOLDINGS OF ANY OTHER CIRCUIT.

The decision below properly followed the "well established" approach adopted by this Court to resolve whether a defense is available under 42 U.S.C. §1983. Malley v. Briggs, ___U.S.___, 106 S. Ct. 1092, 1095 (1986):

> Our initial inquiry is whether an official claiming immunity under §1983 can point to a common-law counterpart to the privilege he asserts. If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether §1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions. (quotations and citations omitted)

Id. See also Tower v. Glover, 467 U.S. 914, 920-21 (1984) and cases cited in the opinion below at 14a-15a.

When the Civil Rights Act was adopted the common law provided, as it provides today, that a conviction of the crime the plaintiff was arrested for is a complete bar to a subsequent civil suit for false arrest. See, e.g., Holley v. Mix, 3 Wend. 350, 353, 20 Am. Dec. 702 (N.Y. 1829); Restatement (Second) of Torts §§119(a), 121(a); Harper & James, The Law of Torts §3.18, at 372-74 (1986). Petitioner's argument that California no longer follows the rule (Pet. at 5), is irrelevant to the fact that the rule existed in 1871 when the Civil Rights Act was enacted. See City of Newport v. Fact Concerts, 453 U.S. 247, 258 (1981).

Because the conviction bar was recognized at common law, the remaining question is whether allowing the defense undermines the Civil Rights Act's purposes of deterrence and compensation. See, e.g., Malley v. Briggs, supra, 106 S. Ct. at 1095;

Owen v. City of Independence, 445 U.S. 622, 651 (1980). As the Court below properly found, the defense is consistent with the purposes of section 1983.

Deterrence is of minimal importance here because, as the Court below stated, the exclusionary rule already operates as a substantial deterrent (19a): "[O]fficers seek to avoid making flawed arrests in order to avoid the exclusion of evidence that could lead to conviction." Petitioner's argument that the exclusionary rule has no effect when no evidence or statements are taken (Pet. at 6), ignores reality. Because arresting officers can not know whether a stop will lead to statements or evidence, the exclusionary rule always deters improper arrests.

The compensatory purpose behind section 1983 does not require abandonment of the conviction bar. As the Court below

found, "the injury caused solely by prematurity of arrest is, of itself, insubstantial" (18a). A "real injury" would be caused only if incriminating evidence were gathered during the arrest (19a). Because that injury is already prevented by operation of the exclusionary rule, it is not necessary to recognize a new civil rights action in order to compensate the plaintiff who is arrested prematurely. Moreover, the near identity of the common law and section 1983 causes of action counsels in favor of adopting the common law judgment that there is no need for compensation. See Pierson v. Ray, 386 U.S. 547 (1967); McClam v. Barry, 697 F.2d 366, 370-71 (D.C. Cir. 1983), overruled on other grounds, Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984) (en banc), cert. denied sub nom District of Columbia v. Brown, 471 U.S. 1073 (1985); Raysor v. Port Authority of

New York and New Jersey, 768 F.2d 34, 40 (2d Cir. 1985), cert denied, ___U.S.___, 106 S. Ct. 1227 (1986).

In Haring v. Prosise, 462 U.S. 306 (1983), this Court held that a plaintiff who pleaded guilty could bring a claim under section 1983 alleging an illegal search. Petitioner argues that Haring requires that he be allowed to bring his action (Pet. at 9). However, petitioner ignores the crucial difference between his case and Haring. In the case at bar, there is a long accepted common law defense, the conviction bar. In contrast, in Haring the Court was being asked to carve out a new defense, not available at common law, for section 1983 lawsuits. As this Court has stated:

> [O]ur role is to interpret the intent of Congress in enacting §1983, not to make a free-wheeling policy choice, and ... we are guided in interpreting Congress's intent by the common-law tradition.

Malley v. Briggs, supra, 106 S. Ct. at 1097. The Fifth Circuit drew this distinction when it noted that this Court in Haring had not been "squarely faced with, and expressly rejected for section 1983 suits, a common law rule preventing an action for illegal search ...." Brown v. Edwards, 721 F.2d 1442, 1449 n.8 (5th Cir. 1984).

The only other Circuit to address the issue squarely adopted the conviction bar for section 1983 false arrest actions. McClam v. Barry, supra, 697 F.2d at 370-71. The Court relied especially on the virtual identity of the common law and civil rights causes of action for false arrest. McClam v. Barry, supra, 697 F.2d at 370-71.

No other Circuit has directly confronted the issue. Decisions in the Fifth Circuit point in both directions. Compare Martin v. Delcambre, 578 F.2d 1164 (1978) (apparently applying conviction bar); Covington v. Cole,

528 F.2d 1365 (1976) (same); Shank v. Spruill, 406 F.2d 756 (1969) (same) with Greer v. Turner, 603 F.2d 521 (1979) (apparently rejecting conviction bar); Brown v. Edwards, supra, 721 F.2d at 1449 n.8 (same). Other Circuits have suggested, in dicta, that the conviction bar should be excluded from a section 1983 action. See Guerro v. Mulhearn, 498 F.2d 1249, 1254-55 (1st Cir. 1974); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968). Cf. Jackson v. Official Representatives of the L.A.P.D., 487 F.2d 885, 886 (9th Cir. 1973) (issue raised only in traditional collateral estoppel terms).

However, those decisions do not follow the approach laid down by this Court for deciding whether a defense is excluded from section 1983. See, e.g., Malley v. Briggs, supra, 106 S. Ct. at 1095. Further, those decisions do not discuss the reasons relied on by the Second and District of Columbia

Circuits for application of the conviction bar to a 1983 action.

The Second and District of Columbia Circuits are thus the only courts to rule on this precise issue. Both Circuits applied the common law conviction bar to the cognate section 1983 action and held that a conviction is "conclusive evidence of the good faith and reasonableness of the officer's belief in the lawfulness of the arrest" (18a).[2]

Thus, there is no need to review this case. The Second Circuit decision followed

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[2]Under New York law a criminal conviction precludes subsequent civil litigation over probable cause to arrest. Broughton v. State, 37 N.Y.2d 451, 458, cert. denied sub nom Schanbarger v. Kellogg, 423 U.S. 929 (1975). The Court below did not reach the question of whether 28 U.S.C. §1738 requires application of this preclusive rule (13a). See Allen v. McCurry, 449 U.S. 90, 96 (1980). See also Haring v. Prosise, 462 U.S. 306, 314 (1983) (determination of the preclusive effect of a prior conviction under state law is the "threshold question" in a 1983 action).

this Court's precedent in the area and the decision is not in conflict with the holdings of any other circuit.

II. THE ISSUE RAISED BY THE PETITION NEED NOT BE REACHED BECAUSE ON THIS RECORD THE RESPONDENTS HAD A LEGALLY SUFFICIENT BASIS TO DETAIN PETITIONER.

This is not a case, as petitioner suggests, where an arrested person was illegally detained for days on a hunch (Pet. at 8). The respondent police officers had a legally sufficient basis to detain petitioner for initial questioning and for further investigation.[3]

The officers stopped petitioner while he drove in New York City in a car with Illinois license plates, because he made an illegal

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[3]The Court below noted, but did not address, the question whether respondents had probable cause to arrest petitioner (20a).

right turn, parked illegally at a bus stop, and because his car had a broken window, which suggested it had been stolen (3a-4a). This was a legally sufficient basis for the initial stop. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968).

When questioned, petitioner produced a Virginia driver's license in the name Sammy Davis, Jr. and a carbon copy of a Hertz rental agreement, which provided that the car would be returned ten days earlier, made out to Jenne Currie (3a-4a). Petitioner said Currie was his aunt (4a). The name Sammy Davis Jr. had been handwritten onto the rental agreement as an additional driver in original ink (4a). Another ink notation said an accident report had been filed (4a).

Respondents received no response to the radioed inquiry into whether the car had been stolen (4a). At that point, the information provided by petitioner

constituted a legally sufficient basis for detaining[4] petitioner until respondents could telephone Hertz. See United States v. Sharpe, 470 U.S. 675 (1985); United States v. OLregon, 748 F.2d 1371, 1376 (10th Cir. 1984). The detention was required because respondents needed to telephone Hertz to check the status of the car. Thus, "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." U.S. v. Sharpe, supra, 470 U.S. at 686. See also United States v. Place, 462 U.S. 696, 709 (1983).

Given the legally sufficient basis for respondents' detention of petitioner, this

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[4]The record does not disclose whether petitioner went voluntarily to the police station where the phone call to Hertz was made.

Court need not reach the question of whether petitioner could bring a section 1983 action despite his conviction on the charge for which he was arrested.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

April 3, 1987

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MATTHEW FOGARTY and JOHN HALBIG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

In Point I of the opposition brief, respondents acknowledge that the Circuits have expressed conflicting views as to whether the common law tort bar to false arrest suits precludes a federal action for a civil rights violation under 42 U.S.C. § 1983. That conflict provides a compelling ground for granting the writ.

The balance of Point I is devoted to the contention that the common law bar is consistent with the civil rights statute. That position is without merit as demonstrated in our petition (at 3).

In Point II of the opposition brief, respondents claim that they had probable cause to arrest petitioner. That claim is legally irrelevant because the Second Circuit held that peti-

tioner had no right to pursue his § 1983 claim even if there was no probable cause (Petition at 10a, 11a, 13a, 15a, 19a, 20a). The Second Circuit's opinion was based on the specific assumption that a federal civil rights action is not allowed where there is *no* probable cause.

Moreover, the court below did not make any findings on the issue of probable cause, an issue which the Second Circuit regarded as immaterial.

This Court has repeatedly stated that "[a]bsent exceptional circumstances" it will not review issues raised for the first time before the Supreme Court. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783 (1977). Respondents have not alleged that such "exceptional" circumstances are present here.

Even after deciding to hear a case, this Court will not consider the issue of probable cause when it lacks a full record below. As the Court wrote:

> [I]n the absence of a record that squarely and necessarily presents the issue and fully illuminates the factual context in which the question arises, we choose not to grapple with the question of the legality of custodial questioning . . . .

Morales v. *New York*, 396 U.S. 102, 105-06 (1969). Here, the record below does not "fully illuminate" the facts as to probable cause, which the Second Circuit regarded as irrelevant.

In belatedly raising the issue of probable cause, respondents mischaracterize the record by claiming that they merely "detain[ed] petitioner for initial questioning and for further investigation" (Opposition brief at 15, 17). Respondents thus are apparently attempting to invoke a lesser standard than is required for an arrest. But this Court has held that custodial questioning cannot be based on "less than probable cause for a full-fledged arrest." *Dunaway* v. *New York*, 442 U.S. 200 (1979).

Conclusion

For the reasons set forth in the petition and for the foregoing reasons, petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

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